

No. 12734

United States
Court of Appeals
for the Ninth Circuit.

ADOLPH W. ENGSTROM, Trustee in Bankruptcy
for Northwest Chemurgy Cooperative, a Cor-
poration, Bankrupt,

Appellant.

vs.

ARTHUR BENZEL.

Appellee.

Transcript of Record

Appeal from the United States District Court,
Eastern District of Washington,
Northern Division.

FILED
OCT 1 1951
WILLIAM DENNIS
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

Attorneys for Plaintiff and Appellant:

EGGERMAN, ROSLING & WILLIAMS,
918 Joseph Vance Bldg.,
Seattle 1, Washington.

Attorneys for Defendant and Appellee:

W. WALTERS MILLER,
Ritzville State Bank Bldg.,
Ritzville, Washington.

HUGHES & JEFFERS,
501 Doneen Bldg.,
Wenatchee, Washington.

In the United States District Court for the Eastern
District of Washington, Northern Division

No. 745—In Bankruptcy

COMPLAINT

ADOLPH W. ENGSTROM, Trustee in Bankruptcy
for Northwest Chemurgy Cooperative, a Cor-
poration, Bankrupt,

Plaintiff,

vs.

ARTHUR BENZEL,

Defendant.

Plaintiff alleges as follows:

1. The action arises under Section 70 of the Act of Congress relating to Bankruptcy (U.S.C. Title 11, Chapter 7, Sec. 110), as hereinafter more fully appears.

2. At all times herein mentioned Northwest Chemurgy Cooperative was and is now a Washington corporation hereinafter sometimes referred to as "Chemurgy."

3. On May 29, 1947, Chemurgy duly filed a Petition for an Arrangement under Chapter XI of the Act of Congress relating to Bankruptcy in the United States District Court for the Western District of Washington, Northern Division, Cause No. 37569. On said date said Court entered an order accepting and approving Chemurgy's Petition for an Arrangement as properly filed under Chapter XI of said Act.

4. Chemurgy was unable to consummate the proposed Arrangement and upon a hearing duly noticed and held pursuant to Section 376 (2) of the Act of Congress relating to Bankruptcy, said Court on December 13, 1947, duly made and entered its order that Chemurgy is a Bankrupt under said Act and that Bankruptcy be proceeded with pursuant to the provisions of said Act.

5. Subsequent to said order determining Chemurgy a Bankrupt, after proceedings duly had therefore, plaintiff on January 6, 1948, was by the order of said Court duly appointed Trustee of the estate of said Bankrupt and thereafter on said January 6, 1948, plaintiff duly qualified as Trustee of said estate and since said date at all times has been the duly appointed, qualified and acting Trustee of the estate of said Bankrupt.

6. At all times herein mentioned Sections 5831-4 and 5831-6 of Remington's Revised Statutes of the State of Washington (Laws of 1941, Ch. 103), Secs. 1 and 3 were in full force and effect. Said statutes provide as follows:

“5831-4, Preference by insolvent corporations—
Definition. Words and terms used in this act shall be defined as follows: (a) ‘Receiver’ means any receiver, trustee, common law assignee, or other liquidating officer of an insolvent corporation. (b) ‘Date of application’ means the date of filing with the Clerk of the Court of the petition or other application for the appointment of a receiver, pursuant to which application such appointment is

made, or in case the appointment of a receiver is lawfully made without court proceedings, then it means the date on which the receiver is designated, elected or otherwise authorized to act as such. (c) 'Preference' means a judgment procured or suffered against itself by an insolvent corporation or a transfer of any of the property of such corporation, the effect of the enforcement of which judgment or transfer at the time it was procured, suffered, or made, would be to enable any one of the creditors of such corporation to obtain a greater percentage of his debt than any other creditor of the same class. L. '41, ch. 103, Sec. 1."

"5831-6, Preference voidable when—Trust fund doctrine superseded. Any preference made or suffered within four (4) months before the date of application for the appointment of a receiver may be avoided and the property or its value recovered by such receiver. No preferences made or suffered prior to such four (4) months' period may be recovered, and all provisions of law or of the trust fund doctrine permitting recovery of any preference made beyond such four (4) months' period are hereby specifically superseded. L. '41, ch. 103, Sec. 4."

7. For at least four (4) months immediately prior to May 29, 1947, Chemurgy was unable to pay its debts in the ordinary course of business and was insolvent within the meaning of said statutes of the State of Washington.

8. Within said four months' period Chemurgy being insolvent paid to the defendant above named

a total of \$1,627.50 upon an antecedent debt or debts then past due and owing by Chemurgy to said defendant upon which defendant is entitled to an offset of \$ None for credit given within said four months' period.

9. The effect of such payment is to enable the said defendant to obtain a greater percentage of the indebtedness due to said defendant than other creditors of the same class.

Wherefore, plaintiff prays for judgment against the defendant in the sum of \$1,627.50 with interest and with costs taxes in favor of the plaintiff and against the defendant.

EGGERMAN, ROSLING &
WILLIAMS,

/s/ DeWITT WILLIAMS,
Attorneys for Plaintiff.

[Endorsed]: Filed May 28, 1948.

District Court of the United States for the Eastern
District of Washington, Northern Division
Civil Action File No. 745

ADOLPH W. ENGSTROM, Trustee in Bankruptcy
for Northwest Chemurgy Cooperative, a Cor-
poration, Bankrupt,

Plaintiff,

vs.

ARTHUR BENZEL,

Defendant.

SUMMONS IN A CIVIL ACTION

To the above-named Defendant: Arthur Benzel.

You are hereby summoned and required to serve upon Eggerman, Rosling & Williams, plaintiff's attorneys, whose address is 918 Joseph Vance Building, Seattle 1, Washington, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

A. A. LaFRAMBOISE,
Clerk of Court.

[Seal] By /s/ EVA M. HARDIN,
Deputy Clerk.

Date: May 28, 1948.

Return on service of writ attached.

[Endorsed]: Filed June 5, 1948.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes Now the defendant, Arthur Benzel, by his attorneys, Hughes & Jeffers and Sam R. Sumner, Sr., and respectfully moves the Court for the entry herein of an order dismissing the above-entitled action, upon the ground that the plaintiff's com-

plaint herein fails to state a claim upon which relief may be granted.

In support of this motion there is hereto attached statement of the reasons upon which defendant bases this motion.

Dated this 17th day of August, 1948.

HUGHES & JEFFERS,

By /s/ JOSEPH L. HUGHES,

/s/ SAM R. SUMNER, SR.,

Attorneys for Defendant.

Statement of Reasons Why the Foregoing Motion for Dismissal Should Be Granted

In this action plaintiff seeks to recover moneys paid to the defendant by plaintiff corporation during the period from January 29, 1947, to May 29, 1947, on the grounds that such payments were preferences and voidable under the provisions of §§ 5831-4 and 5831-6 of Remington Revised Statutes of the State of Washington (Laws of 1941, Ch. 103).

It is defendant's contention that § 5831-5 of Remington's Revised Statutes of the State of Washington (Laws of 1941, Ch. 103, Sec. 2) was in full force and effect at all times mentioned in plaintiff's complaint. That said section provides as follows:

“§ 5831-5—Action to Recover—Limitation. If not otherwise limited by law, actions in the court of this State by a receiver to recover preferences may be commenced at any time within, but not after, six (6) months from the

date of application for the appointment of such receiver.”

That the trustee, who is relying on the provisions of § 5831 Remington Revised Statutes of Washington as authority for his right to recover in this proceeding, is required to accept all conditions of the statute, which grants the existence of his right to recover. (*Dugger vs. Hamilton National Bank*, 29 Fed. Supp. 1021.) In the case at bar the date of application for the appointment of such receiver, as contemplated by the statute, was the 29th day of May, 1947, on which date the Northwest Chemurgy Cooperative, a corporation, filed its petition for an arrangement under Chapter XI of the Act of Congress relating to bankruptcy in the U. S. District Court for the Western District of Washington, Northern Division, Cause No. 37569 (Tit. 11, § 378 (2)). Consequently, the right granted the trustee under the State statute to recover preferential payments terminated on November 29, 1947.

[Endorse]: Filed August 19, 1948.

[Title of District Court and Cause.]

ORDER DENYING MOTION TO DISMISS

The Motion of the defendant to dismiss this action came on regularly for hearing before the undersigned Judge of the above-entitled Court on August 23rd, 1948, the parties being represented in court by their attorneys of record herein. The

Court heard the argument of counsel and thereafter considered the briefs filed on behalf of the parties. On January 5th, 1948, the Court made and filed his opinion herein denying said motion.

Now, Therefore, in accordance with said opinion and ruling and pursuant thereto, it is hereby ordered that defendant's said motion to dismiss be and the same is hereby denied. The exception of the defendant is noted.

Done in Open Court this 27th day of January, 1949.

/s/ SAM M. DRIVER,
Judge.

Presented by:

/s/ DeWITT WILLIAMS,
Of Attorneys for Plaintiff.

Approved as to Form for Entry:

/s/ HUGHES & JEFFERS,
Attorneys for Defendant.

[Endorsed]: Filed January 27, 1949.

[Title of District Court and Cause.]

AGREED STATEMENT OF FACTS

It Is Agreed by and between the above-named plaintiff and defendant that this action may be tried to the court upon the following agreed statement of facts:

I.

At all times herein mentioned Northwest Chem-

urgy Cooperative was and is now a Washington corporation, hereinafter referred to as Chemurgy. On May 29, 1947, Chemurgy duly filed a petition for an arrangement under Chapter XI of the Act of Congress relating to Bankruptcy in the United States District Court for the Western District of Washington, Northern Division, Cause No. 37569. On said date said court entered an order accepting and approving Chemurgy's petition for an arrangement as properly filed under Chapter XI of said Act. Chemurgy was unable to consummate the proposed arrangement and upon a hearing duly noticed and held pursuant to Section 376 (2) of the Act of Congress relating to bankruptcy, said Court on December 13, 1947, duly made and entered its order that Chemurgy is a bankrupt under said Act and that bankruptcy be proceeded with pursuant to the provisions of said Act. Subsequent to said order determining Chemurgy a bankrupt after proceedings duly had therefor, plaintiff, on January 6th, 1948, was by the order of said Court duly appointed Trustee of the estate of said bankrupt and thereafter on said January 6, 1948, plaintiff duly qualified as Trustee of said estate and since said date at all times has been the duly appointed, qualified and acting Trustee of the estate of said bankrupt. At all times herein material Sections 5831-4 and 5831-6 of Rem. Rev. Stat. of the State of Washington (Laws of 1941, Chap. 103, Sections 1 and 3) were in full force and effect. For at least four months immediately prior to May 29, 1947, Chemurgy was unable to pay its debts in the ordinary

course of business and was insolvent within the meaning of said statutes of the State of Washington.

During all of said four months and at the present time there existed and now exists against said insolvent corporation and said bankrupt estate claims of general unsecured creditors on file with said court in said bankruptcy proceeding, upon which claims from the inception thereof as debts of the corporation no payment has been made. The claims allowed and allowable are greatly in excess of the estate assets.

II.

That on the 3rd day of January, 1947, the defendant, Benzel, a shareholder of Chemurgy residing at Ralston, Washington, upon learning that Chemurgy desired to purchase wheat from its shareholders telephoned from the Centennial Flouring Mill office in Ralston, Washington, to Mr. R. D. Whitmore at Wenatchee, Washington, to discuss with Whitmore, who was an employee of Chemurgy, authorized to purchase wheat on its behalf, the matter of selling one thousand (1000) bushels of wheat owned by Benzel to Chemurgy, which wheat was then located at Ralston, Washington, in the warehouse of Centennial Flouring Mills. Whitmore stated that he desired to buy said wheat on behalf of Chemurgy, and thereafter on said date negotiations were carried on by Ralph Snyder of the Centennial Flouring Mills Company on behalf of Benzel. Snyder informed Whitmore that a negotiable warehouse receipt had been issued for said wheat, and Whitmore requested that such receipt be endorsed and forwarded to him via mail

upon said date and that upon receipt thereof a check for the purchase price of said wheat would be mailed to Benzel.

If called as a witness, Snyder would testify as follows: That he, Snyder, then informed Whitemore that he had no authority to sell said wheat except for cash and that Whitemore thereupon informed Snyder that the sale would be a cash sale and during said conversation promised that the check of Northwest Chemurgy would be mailed January 3, 1947, in the sum of \$1,627.50, directed to Benzel, and that in order to effect a cash sale Snyder would be required to mail warehouse receipt No. S6035 for 1,000 bushels of turkey red wheat to Chemurgy on said date. On the other hand, Whitemore, if called as a witness, would deny the foregoing statement of Snyder and would himself testify instead that he told Snyder to mail said warehouse receipt to him and that he would, immediately upon receipt thereof, mail a Chemurgy check in payment of said wheat, and that Snyder agreed to this procedure.

Said receipt, properly endorsed, was mailed to Chemurgy by Snyder pursuant to Whitemore's request, by letter, a copy of which is attached hereto as Exhibit A. Chemurgy failed on January 3, 1947, to mail a check in the sum of \$1,627.50 to Benzel and no further action was taken by or on behalf of Chemurgy with respect to said sale until January 13, 1947, at which time it drew its check for said wheat payable to Benzel, being check No. 7090 dated January 13, 1947, drawn on the Wenatchee Valley Branch of the Seattle-First National Bank, Wenatchee, Washington, in the sum of

\$1,627.50, which Benzel received on the 14th day of January, 1947, together with a statement from Chemurgy with respect to said wheat, entitled "Account Sales, No. 427, dated January 13, 1947," containing the following items:

For Account of Arthur Benzel; Address, Ritzville, Washington; dated January 13, 1947; Warehouse Receipt No. 6035; No. sacks "B;" Gross weight 6000; Grade, No. 1 H. W.; Test, 60; Net price, \$1.70 per bushel:

| | |
|----------------------------|-----------|
| Total Amount | \$1700.00 |
| Less handling charge..... | \$37.50 |
| | ————— |
| Less ins. and storage..... | 35.00 |
| | ————— |
| Total debits | \$72.50 |
| Balance Due | \$1627.50 |

The price of wheat f.o.b. Ralston of the grade here involved was \$1.70 per bushel on January 3, 1947, and \$1.71 per bushel on January 13, 1947.

III.

On January 18, 1947, Benzel first deposited said check No. 7090, dated January 13, 1947, for collection in the Ritzville Branch of the Old National Bank. Said bank presented the check for collection to the Wenatchee Valley Branch, Seattle-First National Bank but said check was returned to the Ritzville Branch, Old National Bank, by said Wenatchee Valley Branch, Seattle-First National Bank, because there were no funds on deposit in said Wenatchee Valley Branch, Seattle-First National

Bank, to pay said check. Said check was returned to Benzel prior to January 22, 1947, and Benzel was informed by the said Old National Bank that said check had not been paid because of insufficient funds, and Benzel then contacted Whitemore and was advised by Whitemore that the check issued was returned by the Wenatchee Valley Branch of the Seattle-First National Bank in error and requested that the check be redeposited, a copy of which letter dated January 22, 1947, marked Exhibit "B," is hereunto attached and made a part of this paragraph. Said check was then by Benzel redeposited and was received from the Ritzville Branch of the Old National Bank by the Wenatchee Valley Branch of Seattle-First National Bank on January 27, 1947, but was not then paid because the Chemurgy account with said bank was then overdrawn and remained overdrawn until February 3, 1947, at which time the check was paid out of the account of Chemurgy with said Seattle-First National Bank, Wenatchee Valley Branch.

IV.

The original of said check No. 7090 will be filed with the Court as an exhibit upon the trial of this action.

V.

On May 8, 1948, said Trustee made demand on the defendant for the return of said alleged preferential payment but the defendant has failed and refused to return said amount or any portion thereof to the Trustee or the bankrupt estate.

Question for Decision

The question for decision by the court under the facts of this case is whether or not the payment of said check by the Wenatchee Valley Branch of the Seattle-First National Bank on February 3rd, 1947, out of the account of Chemurgy in said bank was a preference in the amount of \$1,627.50 within the meaning of a preference as defined in Rem. Rev. Stat. 5831-4 (c).

The foregoing facts and question for the Court are hereby agreed to this day of February, 1950.

EGGERMAN, ROSLING &
WILLIAMS,

By /s/ DeWITT WILLIAMS,
Attorneys for Plaintiff.

JOSEPH L. HUGHES and
W. WALTERS MILLER,

By /s/ JOSEPH L. HUGHES,
Attorneys for Defendant.

EXHIBIT "A"

(Copy)

Centennial Flouring Mills Co.
Grain Dept.
Home Office, Seattle
Ralston, Wash., 1-3-1947

Northwest Chemurgy Corp.
Wenatchee, Wn.
Dear Sir:

Am mailing Whse. Re #S6035 for 1000 bu. Turkey Red wheat. The market today is \$1.70 f.o.b.

Sincerely yours,

RALPH SNYDER, Agt.

P.S. Mail check to Mr. Art Benzel, Ralston, Wn.

EXHIBIT "B"

(Copy)

Northwest Chemurgy Co-Operative
Manufacturers of Starch-Glucose-Dextrose
and By-Products

General Office 533 Doneen Bldg.

Phone 1236

Wenatchee, Washington

January 22, 1947

Mr. Art Benzel
Ralston, Washington.

Dear Mr. Benzel:

We are advised by our bank that the check issued you was returned by them in error, and request that you redeposit this check.

Very truly yours,

NORTHWEST CHEMURGY
COOPERATIVE,

/s/ R. D. WHITMORE 1.b.

R. D. WHITMORE,
Grain Department.

RDW :b

[Endorsed]: Filed April 10, 1950.

[Title of District Court and Cause.]

MOTION FOR REHEARING
AND RECONSIDERATION

Comes Now the plaintiff and moves the court for an order setting down this case for reargument and reconsideration. This motion is based upon the fact that the plaintiff has never had an opportunity to present to the court by oral argument and brief a full presentation of this case for the reason that defendant filed no brief at the time of the argument and the oral argument on behalf of defendant was likewise very brief and the points subsequently raised on brief were not presented at the oral argument nor did the plaintiff have an opportunity to argue these points to the court. Furthermore, although the court has held that the plaintiff has the burden the defendant filed the final brief and plaintiff, under the circumstances, should have an opportunity to present all of the new issues raised by defendant subsequent to the original argument by oral argument. In view of the fact that practically all of defendant's points were raised subsequent to argument and on briefs which the plaintiff has had no opportunity to argue to the court, it is respectfully submitted that a reargument and reconsideration should in all fairness to the plaintiff be granted.

/s/ EGGERMAN, ROSLING &
WILLIAMS,
Attorneys for Plaintiff.

[Endorsed]: Filed August 7, 1950.

[Title of District Court and Cause.]

ORDER

Plaintiff's Motion for Rehearing and Reconsideration in the above-entitled case is hereby denied.

Dated this 7th day of August, 1950.

/s/ SAM M. DRIVER,
United States District Judge.

[Endorsed]: Filed August 7, 1950.

[Title of District Court and Cause.]

RECORD OF OBJECTIONS TO ACTION OF
THE COURT AND REQUEST FOR ACTION AT THE TIME OF THE SIGNING AND ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be It Remembered that at the time of and as a part of the signing and entry of the findings of fact and conclusions of law and judgment herein the plaintiff, pursuant to Rule 46 of the Rules of Civil Procedure made known to the court his objections to the action of the court and made known to the court the action which he desired the court to take, as follows:

Objections to Action of the Court

1. Plaintiff objected to the entry of that portion of the finding of fact III reading: "That the plaintiff has failed to sustain the burden of proving the transaction constitutes an unlawful preference and

was other than a cash transaction" on the grounds (a) that the facts stipulated prove that the payment of the check referred to in finding II on February 3, 1947, was a preference within the meaning of Rem. Rev. Statute 5831-4 and (b) that the transaction referred to in finding II was not a cash transaction and (c) said quotation of purported finding is not contained in the stipulation of facts.

2. Plaintiff objected to the entry of conclusion of law I on the grounds: (a) that the conclusion of law to be drawn from the stipulated facts was that the payment on February 3, 1947, referred to in finding II was a preference within the meaning of Rem. Rev. Statute § 5831-4, (b) that the transaction referred to therein was not a cash transaction as held by the court, (c) that the evidence, facts and findings of fact do not support the statement " * * * there was no intent on the part of either party to create a debtor-creditor relationship," (d) the intent of the parties is immaterial.

3. Plaintiff objected to conclusion of law II that defendant was entitled to have a judgment dismissing the complaint on the ground (a) that the stipulated facts and pertinent law require the entry of judgment as prayed for in the complaint.

4. Plaintiff objected to the entry of judgment dismissing the complaint on the ground that the stipulated facts require, as a conclusion of law, that the payment to defendant of the sum of \$1,627.50 on February 3, 1947, was a preference in said amount within the meaning of Rem. Rev. Statute § 5831-4 (c) and was recoverable under

Rem. Rev. Stat. § 5831-6 by the plaintiff herein from the defendant.

5. Plaintiff objected to the failure of the court to answer the question for decision presented by the agreed statement of facts by holding that payment on February 3, 1947, to the defendant was a preference in the amount of said payment within the meaning of a preference as defined in Rem. Rev. Stat. § 5831-4 (c).

At said time plaintiff also made known to the court that he wished the following action to be taken on the ground that such action was required by the stipulated facts and the conclusion of law to be drawn therefrom under the law relating to the recovery of preferential payments as contained in Rem. Rev. Stat. 5831-4 and Rem. Rev. Stat. § 5831-6:

1. That the court enter the following conclusions of law instead of the conclusions entered by the court:

(a) "The payment of said check out of the funds of Chemurgy on deposit with the Wenatchee Valley Branch of The Seattle-First National Bank on February 3, 1947, was a transfer to the defendant of the property of said insolvent Northwest Chemurgy Cooperative, within the meaning of Rem. Rev. Stat. § 5831-4 and a preference recoverable by the plaintiff from the defendant under Rem. Rev. Stat. of the State of Washington § 5831-4 and § 5831-6.

(b) Plaintiff is entitled to judgment against the defendant Arthur Benzel in said sum of

\$1,627.50 with interest thereon at the rate of 6% per annum from May 8, 1948, until paid and for plaintiff's costs herein to be taxed.

2. That the court enter judgment for the plaintiff and against the defendant in accordance with the foregoing conclusion of law.

The foregoing record of objections made and request for action of the court made this 5th day of October, 1950, at the time of and as a part of the signing and entry of findings of fact, conclusions of law and judgment herein.

Done by the Court.

/s/ SAM M. DRIVER,

Judge.

The foregoing approved for signing and entry by the court at the time of signing and entry of findings, conclusions and judgment.

/s/ W. WALTERS MILLER,

Of Attorneys for Defendant.

Presented by:

/s/ DeWITT WILLIAMS,

Of Attorneys for Plaintiff.

[Endorsed]: Filed October 5, 1950.

In the District Court of the United States for the
Eastern District of Washington, Northern
Division

No. 745

ADOLPH W. ENGSTROM, Trustee in Bankruptcy
for Northwest Chemurgy Cooperative, a Cor-
poration, Bankrupt,

Plaintiff,

vs.

ARTHUR BENZEL,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial before the undersigned Judge of the above-entitled Court upon a written statement of agreed facts made and filed by the parties, the plaintiff being represented in Court by his attorneys of record, Eggerman, Rosling and Williams, and DeWitt Williams, and the defendant being represented in Court by his attorneys, Hughes & Jeffers and Joseph L. Hughes, and the Court having considered the facts as agreed and heard the argument of counsel and after due consideration of written briefs filed by both parties; now, therefore, the Court finds the facts in accordance with said agreed statement of facts as follows:

Findings of Fact

I.

At all times herein mentioned Northwest

Chemurgy Cooperative was and is now a Washington corporation, hereinafter referred to as Chemurgy. On May 29, 1947, Chemurgy duly filed a petition for an arrangement under Chapter XI of the Act of Congress relating to Bankruptcy in the United States District Court for the Western District of Washington, Northern Division, Cause No. 37,569. On said date said Court entered an order accepting and approving Chemurgy's petition for an arrangement as properly filed under Chapter XI of said Act. Chemurgy was unable to consummate the proposed arrangement and upon a hearing duly noticed and held pursuant to §376 (2) of the Act of Congress relating to Bankruptcy, said Court on December 13, 1947, duly made and entered its order that Chemurgy is a bankrupt under said Act and that bankruptcy be proceeded with pursuant to the provisions of said Act. Subsequent to said order determining Chemurgy a bankrupt after proceedings duly had therefor, plaintiff on January 6, 1948, was by the order of said Court duly appointed Trustee of the estate of said bankrupt and thereafter on said January 6, 1948, plaintiff duly qualified as Trustee of said estate and since said date at all times has been the duly appointed, qualified and acting Trustee of the said estate of said bankrupt. At all times herein material §5831-4 and §5831-6 of Rem. Rev. Stat. of the State of Washington (Laws of 1941, Chap. 103, §1 and 3) were in full force and effect. For at least four months immediately prior to May 29, 1947, Chemurgy was unable to pay its debts in the ordinary

course of business and was insolvent within the meaning of said statutes of the State of Washington. During all of said four months and at the present time there existed and now exists against said insolvent corporation and said bankrupt estate claims of general unsecured creditors on file with said Court in said bankruptcy proceedings, upon which claims from the inception thereof as debts of the corporation no payment has been made. The claims allowed and allowable in said bankruptcy proceedings are greatly in excess of the estate assets.

II.

On or about January 3, 1947, the defendant Arthur Benzel, by endorsing and delivering to Northwest Chemurgy Cooperative a negotiable warehouse receipt covering 1,000 bushels of wheat, sold and delivered said wheat to said corporation at the agreed net price, after deducting charges for handling, insurance and storage of \$72.50, of \$1,627.50. On or about January 13, 1947, Northwest Chemurgy Cooperative drew its check for said wheat payable to defendant, being check No. 7090 dated January 13, 1947, drawn on the Wenatchee Valley Branch of the Seattle-First National Bank, Wenatchee, Washington, in said sum of \$1,627.50, which check the defendant received on January 14, 1947. Said check has been admitted as an exhibit in this action. On January 18, 1947, defendant first deposited said check for collection in the Ritzville Branch of the Old National Bank. Said bank presented said check for collection to the Wenatchee Valley Branch, Seattle-First National Bank, and said check was

returned because there were no funds on deposit in said Wenatchee Valley Branch, Seattle-First National Bank to pay said check. Said check was redeposited by the defendant with the Ritzville Branch of the Old National Bank for collection and was received from said Ritzville Branch by the Wenatchee Valley Branch of the Seattle-First National Bank on January 27, 1947, but was not then paid because the Chemurgy account with said bank was then overdrawn and remained overdrawn until February 3, 1947, at which time the check was paid out of the account of Northwest Chemurgy Cooperative with said Seattle-First National Bank, Wenatchee Valley Branch.

III.

On May 8, 1948, said Trustee made demand on the defendant for the return of said alleged preferential payment but the defendant has failed and refused to return said amount or any portion thereof to the Trustee or the bankrupt estate.

That the plaintiff has failed to sustain the burden of proving that the transaction constituted an unlawful preference and was other than a cash transaction.

From the foregoing Findings of Fact, the Court draws the following

Conclusions of Law

I.

That payment of said check out of the funds of Chemurgy on deposit with the Wenatchee Valley Branch of the Seattle-First National Bank on Feb-

ruary 7, 1947, was not such a transfer to the defendant of the property of said insolvent Northwest Chemurgy Cooperative as to constitute an unlawful preference within the meaning of Rem. Rev. Stat. of the State of Washington, §5831-4, as the transaction was in substance and effect a cash transaction and there was no intent on the part of either party to create a debtor-creditor relationship.

II.

That defendant is entitled to have entered a judgment against the plaintiff, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, dismissing plaintiff's complaint with prejudice and awarding defendant judgment for costs herein to be taxed in the sum of \$.....

The foregoing Findings of Fact and Conclusions of Law made and entered this 5th day of October, 1950.

/s/ SAM M. DRIVER,
Judge.

Approved as to form subject to "Record of Objections," notice of presentation waived.

/s/ DeWITT WILLIAMS,
Of Attorneys for Plaintiff.

Presented by:

/s/ JOSEPH L. HUGHES,
Of Attorneys for Defendant.

[Endorsed]: Filed October 5, 1950.

In the District Court of the United States for the
Eastern District of Washington, Northern
Division

No. 745

ADOLPH W. ENGSTROM, Trustee in Bankruptcy
for Northwest Chemurgy Cooperative, a Cor-
poration, Bankrupt,

Plaintiff,

vs.

ARTHUR BENZEL,

Defendant.

JUDGMENT

This matter came on regularly before the under-
signed judge of the above-entitled Court for trial
on April 10, 1950, upon an agreed statement of
facts made and filed by the parties hereto, plaintiff
being represented in court by his attorneys, Egger-
man, Rosling & Williams, and DeWitt Williams,
and the defendant being represented in Court by
his attorneys, Hughes & Jeffers, and Joseph L.
Hughes, and the Court having made and entered
its Findings of Fact and Conclusions of Law re-
quiring entry of judgment for the defendant in
accordance with his answer herein; now, therefore,
pursuant to said Findings and Conclusions, it is
hereby

Ordered, Adjudged and Decreed that the plain-
tiff's complaint herein be dismissed with prejudice.

It Is Further Ordered, Adjudged and Decreed
that the defendant Arthur Benzel be and he is
hereby granted judgment against the plaintiff

Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, bankrupt, for his costs herein to be taxed by the Clerk, in the sum of \$20.00.

This judgment made and entered in open Court this 5th day of October, 1950.

/s/ SAM M. DRIVER,
Judge.

Approved as to form subject to "Record of Objections," notice of presentation waived.

/s/ DeWITT WILLIAMS,
Of Attorneys for Plaintiff.

Presented by:

/s/ JOSEPH L. HUGHES,
Of Attorneys for Defendant.

[Endorsed]: Filed October 5, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Arthur Benzel, defendant and to Joseph L. Hughes, and W. Walters Miller, his attorneys.

You and Each of You are hereby notified that the above named plaintiff, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, bankrupt, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment rendered and entered in the above-entitled cause on October

5, 1950, and from each and every part thereof.

Dated this 16 day of October, 1950.

EGGERMAN, ROSLING &
WILLIAMS,

/s/ DeWITT WILLIAMS,

Attorneys for Plaintiff Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 19, 1950.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know all men by these presents: That we, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, as Principal, and United Pacific Insurance Company, as Surety, acknowledge ourselves to be jointly indebted to United States of America, appellee in the above cause, in the sum of Two Hundred Fifty and No/100 (\$250.00) Dollars, conditioned that

Whereas, on the 5th day of October, 1950, in the District Court of the United States for the Eastern District of Washington, in a suit pending in that court, wherein Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, was Plaintiff and Arthur Benzel was Defendant, a judgment was rendered against said Plaintiff and the Plaintiff having filed

in the office of the Clerk of the said District Court a notice of appeal therefrom to the United States Court of Appeals for the Ninth Circuit.

Now the Condition of the Above Obligation Is Such, that if said Plaintiff shall prosecute his appeal to effect and answer all costs, if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified, then the above obligation is void, also to remain in full force and effect.

Signed, sealed and dated this 9th day of October, 1950.

/s/ ADOLPH W. ENGSTROM,
Trustee in Bankruptcy for Northwest Chemurgy
Cooperative, a Corporation, Bankrupt.

UNITED PACIFIC INSUR-
ANCE COMPANY,

[Seal] By /s/ ARMAND MINORCHIO,
Attorney-in-Fact.

Countersigned:

TILESTON GRINSTEAD,
Resident Agent, Seattle,
Washington.

[Endorsed]: Filed October 19, 1950.

(3)
41

PLAINTIFF'S EXHIBIT NO. 1
NORTHWEST CHEMURGY CO-OPERATIVE

MANUFACTURERS OF

STARCA GYCOSE - DEXTROSE AND BY-PRODUCTS

GENERAL OFFICE, 126 SO. WENATCHEE AVE.

WENATCHEE, WASHINGTON

January 13

No. 7090

1947

PAY TO THE ORDER OF

Art Benzel

RESERVED BY BANK AND SOCIETY

NORTHWEST CHEMURGY CO-OPERATIVE

DOLLARS

\$ 1627.50

WENATCHEE VALLEY BRANCH
SEATTLE FIRST NATIONAL BANK

981220 WENATCHEE, WASHINGTON

BY *[Signature]*

15

Benzel

745

PLAINTIFF'S EXHIBIT No.

TO THE ORDER OF BANK OR BANKER
FOR INDORSEMENTS GUARANTEED
FOR THROUGH PAYMENT
WENATCHEE VALLEY BANK

JAN 21 1947

TO THE ORDER OF
WENATCHEE VALLEY BANK
Spokane Branch
1111 1st St.
Spokane, Wash.

TO THE ORDER OF
RITZVILLE BANK OF SPOKANE
Prior Endorsements Guaranteed
JAN 25 1947
ANY BANK, BANKER or TRUST CO.

1111 1st St.
Spokane, Wash. 8:30-9:30

WENATCHEE VALLEY BANK
Spokane Branch
1111 1st St.
Spokane, Wash.

WENATCHEE VALLEY BANK
Spokane Branch
1111 1st St.
Spokane, Wash.

WENATCHEE VALLEY BANK
Spokane Branch
1111 1st St.
Spokane, Wash.

WENATCHEE VALLEY BANK
Spokane Branch
1111 1st St.
Spokane, Wash.

WENATCHEE VALLEY BANK
Spokane Branch
1111 1st St.
Spokane, Wash.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of Said Court:

Herewith we hand you Notice of Appeal and Bond on Appeal in the above entitled cause.

Will you please prepare the Record on Appeal in the manner provided by Rule 75, consisting of all proceedings and evidence in this action, which the appellant understands to consist of the following:

1. Summons and Return of Service.
2. Complaint.
3. Answer.
4. Agreed Statement of Facts.
5. All Exhibits.
6. Motion for Rehearing and Reconsideration.
7. Order Denying Motion for Rehearing and Reconsideration.
8. Findings of Fact and Conclusions of Law.
9. Judgment.
10. Record of Objections to Action of the Court, and Request for Action.
11. Notice of Appeal.
12. Bond on Appeal.
13. Motion to Dismiss.
14. Order Denying Motion to Dismiss.

15. Designation of Record.

EGGERMAN, ROSLING &
WILLIAMS,

/s/ DeWITT WILLIAMS,

Attorneys for Plaintiff Appellant Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 27, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF THE CLERK

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the original

1. Complaint.
2. Summons.
3. Motion to Dismiss.
4. Order Denying Motion to Dismiss.
5. Agreed Statement of Facts.
6. Exhibit: Plaintiff's 1, Cancelled Check, Northwest Chemurgy Cooperative to Benzel dated 1/13/47 \$1627.50.

7. Motion for Rehearing and Reconsideration.
8. Order Denying Motion for Rehearing and Reconsideration.
9. Record of Objections to Action of the Court and Request for Action at Time of the Signing and Entry of Findings of Fact and Conclusions of Law.
10. Findings of Fact and Conclusions of Law.
11. Judgment for Defendant.
12. Notice of Appeal.
13. Cost Bond on Appeal.
14. Designation of Record on Appeal.

on file in the above entitled cause, and that the same constitutes the record for hearing of the Appeal from Judgment of the United States District Court for the Eastern District of Washington in the United States Court of Appeals for the Ninth Circuit as called for by the Appellant in his designation of record on Appeal.

(Note—Item No. 3 of Plaintiff's Designation, "Answer" is not included for the reason that no answer was filed—the case being tried on an Agreed Statement of Facts.)

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at

Spokane, in said District, this 8th day of November,
A.D., 1950.

A. A. LaFRAMBOISE,
Clerk.

[Seal] By /s/ EVA N. HARDIN,
Deputy.

[Endorsed]: No. 12734. United States Court of Appeals for the Ninth Circuit. Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a Corporation, Bankrupt, Appellant, vs. Arthur Benzel, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed: November 10, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12734

ADOLPH W. ENGSTROM, Trustee in Bankruptcy
for Northwest Chemurgy Cooperative, a Cor-
poration, Bankrupt,

Appellant.

vs.

ARTHUR BENZEL,

Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

To: Arthur Benzel and Mr. W. Walters Miller, his
attorney:

You and Each of You are hereby notified that
appellant's statement of points on this appeal is as
follows:

I.

In determining whether a payment of money
by an insolvent corporation is a preference within
the meaning of Rem. Rev. Stat. of the State of
Washington, §5831-4, the intent of the parties is
immaterial. The determination is made on the basis
of the effect of the payment in diminishing the
funds of the corporation in payment of an obligation
existing prior to the date of payment.

II.

The obligation here involved arose when wheat
was sold and delivered to Chemurgy by appellee
on January 3, 1947. Title to the wheat passed to
Chemurgy by the delivery on said date of a nego-
tiable warehouse receipt for said wheat. The prefer-
ential payment under Rem. Rev. Stat. §5831-4
occurred on February 3, 1947, when the wheat was
paid for out of the account of Chemurgy by its
bank.

III.

The above described transaction was not a "cash
transaction" since the seller (appellee) did not re-
ceive payment for said wheat when he sold and
delivered it.

IV.

The payment out of the bank account of Chemurgy on February 3, 1947, to appellee was a preference recoverable by appellant as Trustee in Bankruptcy under Rem. Rev. Stat. §5831-4 and §5831-6.

Designation of Record

Appellant hereby designates as material to the consideration of this appeal all of the record certified to the United States Court of Appeals under date of November 8, 1950, by the Clerk of the District Court from which this appeal was taken.

Dated this 17th day of November, 1950.

EGGERMAN, ROSLING &
WILLIAMS,

/s/ DeWITT WILLIAMS,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 18, 1950.